In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 786

J. F. BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1967. The petition for a writ of certiorari was filed on November 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1952 is unconstitutionally vague and restrictive of interstate travel.

2. Whether the district court abused its discretion in failing to grant two motions for a mistrial.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
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> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

STATEMENT

Petitioner and two others were convicted by a jury, in the United States District Court for the Middle District of Tennessee, under eleven counts of a seventeen-count indictment charging that they conspired to use, and did use, the facilities of interstate commerce to carry on the operation of a gambling establishment illegal under State law (1) by having dice shipped into the State by common carrier and (2) by cashing checks which would have to be mailed to out-of-state drawee banks for collection, in violation of 18 U.S.C. 1952 and 371. On January 14, 1966, petitioner was fined $2,000 and was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals reversed the convictions of all three defendants on the conspiracy count, and reversed the convictions of the co-defendants, but not of petitioner, on the substantive counts.

1. The evidence, petitioner acknowledges, was "substantial and material" (Pet. 4). It showed that from 1952 to January 1965 petitioner and two partners, his co-defendants at trial, operated an illegal gambling business known as the Uptown Club in Nashville, Tennessee. Petitioner was the managing partner of the business. In operating the club, he ordered shipments of dice from firms outside the State, and cashed and endorsed patron's checks on out-of-state banks.

2. On the morning of the third day of trial, the defense moved for a mistrial on the ground that two newspapers and a television news broadcast had carried an item about a matter which had taken place

outside the presence of the jury relating to potential testimony by a witness that he had gambled at the club several months after the indictment (Tr. 245-246; see Pet. App. B 33-35). Examination of the jurors disclosed that only three jurors had seen any of the items in question. One had "read a portion" of one newspaper article (Tr. 264-265). Another had seen the television newscast and had "just glanced over" the other newspaper article but "didn't read it all" (Tr. 264). A third had seen the television newscast but did not recall what had been said (Tr. 265-266). The jurors assured the court that they had not formed any opinion as a result of what they had seen and read, and that they had not discussed the matter with any other juror (Tr. 264-268). The court, out of the presence of the jury, stated to counsel (Tr. 269):

> I could do this now, I could excuse [the two jurors who had seen the newspaper accounts] and that would leave only the man who saw the TV program on the air. They hadn't discussed it with each other in any way.

Government counsel stated that he saw no necessity for the procedure but had no objection to it. When the court then asked the three defense counsel what their preference was on this matter, counsel conferred and then stated (Tr. 269):

> The defendants do not insist that Your Honor discharge any member of the jury on account of what has taken place.

The court then called in the jury, and expressly charged that its verdict must be based exclusively on

the evidence presented in the courtroom (Tr. 270). A similar admonition was repeated later in the court's general instructions (Tr. 357).

3. In the course of his summation to the jury, the government attorney stated (Tr. 318):

> I'm not going to spend much time in argument. I'm going to let the government's case speak from the witnesses who have been here, and from the documents. There's not much reason for the government in this case to argue at great lengths. Now the defense counsel may argue at great lengths, because they rested, of course, without calling a witness, but—

Counsel for petitioner objected to the foregoing argument and counsel for one of the co-defendants made a motion for a mistrial (Tr. 318). The court instructed the jury (Tr. 318):

> * * * The jury will disregard the statement. The Defendant has a right not to call any witnesses, and there is a presumption of [his] innocence at all times.

The court added (Tr. 319):

> * * * In other words, no inference will be drawn against the defendants by reason of the statement made by the United States Attorney.

Thereafter, in the general charge to the jury, the court instructed on the presumption of innocence and the burden of proof (Tr. 337-338), and stated (Tr. 341):

> Now the defendants in this case elected not to take the witness stand, and this is their privilege.

> The law gives a defendant or defendants in a criminal prosecution the right not to offer any evidence or to take the witness stand themselves. This is a constitutional privilege, and no inference is to be made or indulged against them in any way whatsoever by reason of the fact that they saw fit to elect to exercise this privilege, that is, not to take the witness stand and not to offer evidence.

ARGUMENT

1. There is no merit in petitioner's assertions that 18 U.S.C. 1952 fails to give adequate notice of the nature of the conduct prohibited, and that it unlawfully restricts the freedom of interstate travel, in violation of the Constitution. The various courts of appeals have repeatedly and uniformly upheld the constitutionality of the statute against attacks on these specific grounds. *United States* v. *Barrow*, 363 F. 2d 62, 65 (C.A. 3), certiorari denied, 385 U.S. 1001; *Marshall* v. *United States*, 355 F. 2d 999, 1003 (C.A. 9), certiorari denied, 385 U.S. 815; *United States* v. *Zizzo*, 338 F. 2d 577, 579 (C.A. 7), certiorari denied, 381 U.S. 915; *Turf Center, Inc.* v. *United States*, 325 F. 2d 793, 795-796 (C.A. 9); *Bass* v. *United States*, 324 F. 2d 168, 172-173 (C.A. 8); see also *United States* v. *Compton*, 365 F. 2d 1, 3 (C.A. 6), certiorari denied, 385 U.S. 956.[1] No conflict of decisions thus

[1] Section 1952 "embraces commonly understood words and prescribes a clear standard" (*Bass* v. *United States*, *supra*, 324 F.2d at 173); it infringes no right of lawful interstate travel, for it proscribes only travel in or use of interstate commerce in connection with certain specifically denominated unlawful activities (*supra*, p. 2).

exists and, in light of this overwhelming contrary authority, petitioner's contentions in this regard border on the frivolous.

2. There was no abuse of discretion in the district court's failure to grant the two motions for a mistrial. In regard to the allegedly prejudicial publicity, it became apparent during the course of the hearing and the examination of the jury that the newspaper and television items were innocuous in nature (see Pet. App. B 33-35), and that the exposure of the jurors was minimal and of no significant effect (see *supra*, p. 4). All three defense counsel thereafter permitted the original motion for a mistrial to pass without a ruling and apprised the court that they found no necessity for discharging "any member of the jury on account of what has taken place" (Tr. 269).

In regard to the argument of the government attorney, the reference to "the defense counsel [having] rested * * * without calling a witness" was plainly not a comment designed to suggest that an improper inference be drawn from the defendants' election not to testify; nor was it likely to be taken as such. In context, the statement was a part of the government attorney's explanation of the proposed brevity of his argument in relation to the probable length of the forthcoming arguments of the defense counsel who had not revealed their line of defense through the presentation of evidence. In any event, the trial court cured any possible misinterpretation by instructing the jury to disregard the statement and to draw no inference of any kind from the failure of the defend-

ants to take the stand or to present other evidence (Tr. 318-319, 341). See *Sterling* v. *United States*, 333 F. 2d 443, 446-450 (C.A. 9), certiorari denied, 379 U.S. 933; *United States* v. *Wright*, 309 F. 2d 735, 738-739 (C.A. 7), certiorari denied, 372 U.S. 929; *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10).[2]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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DECEMBER 1967.

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[2] As noted by the court of appeals, petitioner's reliance on *Sheppard* v. *Maxwell*, 384 U.S. 333, *Marshall* v. *United States*, 360 U.S. 310, and *Stewart* v. *United States*, 366 U.S. 1 (Pet. 9-12), is misplaced, for "[t]he allegedly prejudicial publicity and argument here relied upon cannot be compared in magnitude and kind with what was considered in *Sheppard*, *Marshall* or *Stewart* * * *" (Pet. App. 29). Moreover, as the court below stated, "* * * the asserted errors, if they were such, were harmless in nature," citing *Chapman* v. *California*, 386 U.S. 18 (*ibid.*).

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